Supreme Court, U.S.
FILED
AUG 19 2002
OFFICE OF THE CLERK

(8)

No. 01-1289

In the Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

CURTIS B. CAMPBELL AND INEZ PREECE CAMPBELL,

Respondents.

On Writ of Certiorari to the Utah Supreme Court

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

EVAN M. TAGER
Mayer, Brown, Rowe & Maw
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

ROBIN S. CONRAD
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

ANDREW L. FREY
Counsel of Record
ANDREW H. SCHAPIRO
Mayer, Brown, Rowe & Maw
1675 Broadway
New York, NY 10019
(212) 506-2500

41pp

QUESTION PRESENTED

Whether the $145 million punitive damages award in this case, which is 145 times respondents' compensatory damages, is unconstitutionally excessive.

TABLE OF CONTENTS

Page

QUESTION PRESENTED I

TABLE OF AUTHORITIES iv

INTRODUCTION AND SUMMARY OF ARGUMENT . 1

ARGUMENT 4

A. The "Reasonable Relationship" Requirement Dictates That The Punitive Damages Be A Modest, Single-Digit Multiple Of Compensatory Damages When, As Here, Compensatory Damages Are Substantial And There Is No Reason To Suppose That They Understate The Injury Caused By The Conduct 4

B. The Fact That The Conduct That Injured The Plaintiff May Be Part Of A Broader Pattern Of Misconduct Is Not A Valid Justification For Disregarding The Reasonable Relationship Requirement 9

1. The Utah Supreme Court's approach unfairly subjects defendants to all the risks of a class action, while affording them none of the safeguards 11

2. The Utah Supreme Court's approach engenders a grave risk of excessive, multiple punishment ... 13

3. The Utah Supreme Court's approach is a one-way ratchet that fails to account for the possibility that other juries and courts might not find the defendant's conduct to be punishable 19

TABLE OF CONTENTS — Continued

Page

4. It is grossly unfair to expect a defendant in an individual case to fend off far-flung allegations of conduct directed at individuals who are not before the court 21

5. Civil juries lack the institutional competence to perform the role of super-regulator 23

6. The Utah Supreme Court's approach threatens to turn every case into a "bet-the-company" event, thereby distorting the legal system by creating inordinate pressure to settle even weak cases 25

C. When, As Here, Evidence Of Conduct Directed At Non-Parties Has Been Admitted, It Is Especially Important To Enforce The Requirement That Punitive Damages Be Reasonably Related To The Plaintiff's Injury 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases:

2660 Woodley Rd. Joint Venture v. ITT Sheraton Corp., 2002 WL 53913 (D. Del. Jan. 2002) 8

Allied-Signal, Inc. v. Director, Div. of Taxation, 504 U.S. 768 (1992) 19

Avery v. State Farm Mut. Auto. Ins. Co., 746 N.E.2d 1242 (Ill. App. Ct. 2001) 13

Berry v. State Farm Mut. Auto. Ins. Co., 9 S.W.3d 884 (Tex. Ct. App. 2000) 20

BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) .. *passim*

Broussard v. Meineke Disc. Muffler Shops, Inc., 155 F.3d 331 (4th Cir. 1998) 12

Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996) 26

Continental Trend Res., Inc. v. OXY USA Inc., 101 F.3d 634 (10th Cir. 1996) 8

Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) 6

Davis v. Celotex Corp., 420 S.E.2d 557 (W. Va. 1992) 18

Dickson v. State Farm Ins. Co., 2000 WL 547395 (Alaska Super Ct. Feb.14, 2000) 20

TABLE OF AUTHORITIES — Continued

Page

Dunn v. HOVIC, 1 F.3d 1371 (3d Cir. 1993) 18

Ex Parte Lange, 85 U.S. (18 Wall.) 163 (1873) 14

Fischer v. Johns-Manville Corp., 512 A.2d 466 (N.J. 1986) 17

Flannery v. Baltimore & O.R.R., 15 D.C. 111 (1885) 5

Grant v. McDonogh, 7 La. Ann. 447 (1852) 5

Gryger v. Burke, 334 U.S. 728, 732 (1948) 29

Holderness v. State Farm Ins., 2001 WL 1740090 (Alaska Super. Ct. Sept. 10, 2001) 20

Honda Motor Co. v. Oberg, 512 U.S. 415 (1994) 4

In re Exxon Valdez, 270 F.3d 1215 (9th Cir. 2001) 9

In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995) 26

Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc., 181 F.3d 446 (3d Cir. 1999) 8

International & G.N.R. v. Telephone Tel. Co., 5 S.W. 517 (Tex. 1887) 5

Juzwin v. Amtorg Trading Corp., 718 F. Supp. 1233 (D.N.J. 1989) 15, 17

Kochan v. Owens-Corning Fiberglas Corp., 610 N.E.2d 683 (Ill. App. Ct. 1993) 18

TABLE OF AUTHORITIES — Continued

Page

Komlosi v. Fudenberg, 2000 WL 351414 (S.D.N.Y. Mar. 31, 2000) 8

Lindsey v. Normet, 405 U.S. 56 (1972) 12

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) ... 12

Louisville & N.R. v. Roth, 114 S.W. 264 (Ky. 1908) 5

MIC Life Ins. Co. v. Hicks, 2002 WL 1722168, at 6 (Miss. July 25, 2002) 28

MMAR Group, Inc. v. Dow Jones & Co., 987 F. Supp. 535 (S.D. Tex. 1997) 9

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) 25

Mitchell v. Randal, 137 A. 171 (Pa. 1927) 5

Mobile & M.R.R. v. Ashcraft, 48 Ala. 15 (1872) 5

Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35 (Tex. 1998) 15, 18

Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991) 2, 6, 7

Page v. Yool, 65 P. 636 (Colo. 1901) 5

Pennington v. Gillaspie, 66 S.E. 1009 (W. Va. 1910) 5

Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967) 14, 15, 17

TABLE OF AUTHORITIES — Continued

Page

Saunders v. Mullen, 24 N.W. 529 (Iowa 1885) 5

Schad v. Arizona, 501 U.S. 624 (1991) 4

Schrader v. State Farm Mut. Auto. Ins. Co., No. CV 91-23590 (Ariz. Super. Ct. June 20, 1997) 20

Simpson v. Pittsburgh Corning Corp., 901 F.2d 277 (2d Cir. 1990) 18

St. Louis, I.M. & S. Ry. Co. v. Williams, 251 U.S. 63 (1919) 7

State Farm Fire & Cas. Co. v. Owen, 729 So. 2d 834 (Ala. 1998) 20

State Farm Lloyds v. Nicolau, 951 S.W.2d 444 (Tex. 1997) 16

Stevens v. Owens-Corning Fiberglas Corp., 49 Cal. App. 4th 1645 (1996) 17-18

Trovan, Ltd. v. Pfizer, Inc., 2000 WL 709149 (C.D. Cal. May 24, 2000) 9

TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993) 2, 7

United States v. Armour & Co., 402 U.S. 673 (1971) 12

Walter v. State Farm Fire & Cas. Co., 1999 WL 1069154 (C.D. Cal. Feb. 18, 1999) 20

TABLE OF AUTHORITIES — Continued

Page

Western Union Co. v. Pennsylvania,
368 U.S. 71 (1961) 14

Witte v. United States, 515 U.S. 389 (1995) 29

Constitutions, Statutes, Regulations:

15 U.S.C. § 15 6

15 U.S.C. § 1117(b) 6

18 U.S.C. § 1964 6

31 U.S.C. § 3729 6

35 U.S.C. § 284 6

Miscellaneous:

13 CYC. OF L. & P. (1904) 5-6

Developments, The Paths of Civil Litigation,
113 Harv. L. Rev. 1783 (2000) 27

Exodus 22:1 4

Exodus 22:9 4

Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139 (1986) 15

Klayman & Klayman, *Punitive Damages: Toward Torah-Based Tort Reform*,
23 Cardozo L. Rev. 221 (2001) 4

TABLE OF AUTHORITIES — Continued

Page

Polinsky & Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869 (1998) 27

2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I (2d ed. 1899) 4

4 T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES (9th ed. 1920) 5

Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 Geo. L.J. 285 (1998) 27

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the nation's largest federation of business companies and associations, with underlying membership of more than 3,000,000 businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business. This brief is filed because the sound and fair administration of punitive damages is a matter of profound concern to the Chamber's members.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has made clear in a series of decisions that an award of punitive damages must be reasonably related to the actual and potential harm at issue in a case. That requirement — alternatively described as mandating that "exemplary damages must bear a 'reasonable relationship' to compensatory damages" (*BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 580 (1996)) — functions as a critical, objective anchor, serving to ensure proportionality between punishment and offense.

---

[1] The parties have executed blanket consents to the filing of *amicus* briefs, which have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than amicus, its members, or its counsel made any monetary contribution to the preparation or submission of this brief. Outside counsel to *amicus,* Mayer, Brown, Rowe & Maw (then Mayer, Brown & Platt), served as co-counsel for petitioner during the post-trial proceedings and in the Utah Supreme Court. However, Mayer, Brown no longer represents State Farm in this matter.

This Court's decisions indicate that the range of acceptable ratios is a modest one, bounded by traditional, single-digit multipliers. In *Pacific Mutual Life Insurance Co. v. Haslip,* 499 U.S. 1, 23-24 (1991), for example, this Court stated that a 4:1 ratio of punitive to compensatory damages "may be close to the line" of constitutional impropriety. In *TXO Production Corp. v. Alliance Resources Corp.,* 509 U.S. 443 (1993), this Court allowed a $10 million award to stand only after concluding that the ratio in that case — which nominally appeared to be 526:1 — actually was "not more than 10 to 1" and might have been much lower. *BMW,* 517 U.S. at 581. And in *BMW*, in describing the ratio guidepost, this Court pointed to historical precedents permitting double and treble damages. *Id.* at 580-581 & n.33.

How, then, did the Utah Supreme Court reach the conclusion that the ***145:1*** ratio in this case was permissible? In fact, it never did. Rather, the Utah court held that, where other factors "support a large punitive damages award, a judge should not decrease the amount solely because of the ratio of punitive to compensatory damages." Pet. App. 26a. In other words, if certain factors are present, an award need bear no reasonable relationship to the harm to the plaintiff.

The Utah Supreme Court's approach, which unfortunately is far from unique, threatens to render *BMW*'s second guidepost a nullity, deprived of "its constraining power to protect against serious and capricious deprivations." *BMW*, 517 U.S. at 590 (Breyer, J., concurring). While there is nothing impermissible about looking to factors such as the history and extent of a tortfeasor's misconduct to determine ***where*** within the range of acceptable ratios a given award should fall, it is fundamentally unfair ***to punish for*** conduct directed against non-parties, and an award that does not bear a reasonable relationship to the actual and potential harm suffered by the plaintiff — such as the award at issue in this case — does just that.

In upholding the massive award, the Utah Supreme Court relied heavily upon the supposed widespread nature of State Farm's misconduct. But, for several reasons, evidence of conduct directed at, and harms suffered by, non-parties cannot serve as a reason for disregarding the second guidepost.

To begin with, allowing the Campbells to collect punitive damages for torts affecting individuals not before the court, while leaving those non-parties free to seek such damages themselves, invites excessive multiple punishment, in violation of due process. Indeed, the Utah Supreme Court's approach imposes upon a defendant all the risks of a class action (in terms of gigantic liability) without affording it any of the protections attendant to such a proceeding. Moreover, such a regime would grant juries powers significantly in excess of their legitimate authority, and — due to the manifest danger of a catastrophic, aberrational verdict when serial plaintiffs seek massive punitive awards for alleged aggregate misconduct — would put virtually every significant, publicly held corporation at risk of one or more eight- or, as here, nine-digit exactions.

As a matter of common sense, fundamental fairness, and traditional practice, the proper role of the jury in an individual case is to calibrate punishment to the harm suffered by the plaintiff. Accordingly, courts and juries cannot be permitted to disregard the reasonable relationship requirement on the ground that the defendant committed torts against individuals who are not before the court.

ARGUMENT

A. The "Reasonable Relationship" Requirement Dictates That The Punitive Damages Be A Modest, Single-Digit Multiple Of Compensatory Damages When, As Here, Compensatory Damages Are Substantial And There Is No Reason To Suppose That They Understate The Injury Caused By The Conduct.

"The principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree." *BMW*, 517 U.S. at 580. That pedigree is relevant because, "[a]s this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994). See also *Schad v. Arizona*, 501 U.S. 624, 640 (1991) (noting the "importance of history and widely shared practice as concrete indicators of what fundamental fairness and rationality require").

In reviewing the origins of punitive damages, this Court has pointed to "early English statutes authorizing the award of multiple damages for particular wrongs." *BMW*, 517 U.S. at 581. See 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 522 (2d ed. 1899) ("under Edward I, a favourite device of [English] legislators [was] that of giving double or treble damages to 'the party grieved'").[2] Such statutes provided for, in appropriate

[2] Multiple damages have existed as a civil remedy since at least biblical times. The magnitude of punitive damages set out in the Old Testament ranged from one-fifth of the compensatory damages to a maximum of five-fold damages. Klayman & Klayman, *Punitive Damages: Toward Torah-Based Tort Reform*, 23 CARDOZO L. REV. 221, 229 (2001). See, *e.g.*, Exodus 22:1 ("If a man shall steal an ox, or a sheep, and kill it, or sell it; he shall restore five oxen for an ox, and four sheep for a sheep."); Exodus 22:9 ("For all manner of

cases, ratios of 1:1 (double damages), 2:1 (treble damages), or 3:1 (quadruple damages). *BMW*, 517 U.S. at 581.[3] Similarly,

trespass [to goods], * * * whom the judges shall condemn, he shall pay double unto his neighbor.").

[3] This emphasis on the relationship between punishment and harm, ordinarily captured by comparing punitive and compensatory damages, also has been a central focus of common-law excessiveness review for well over a century. See, *e.g.*, *Mobile & M.R.R. v. Ashcraft*, 48 Ala. 15, 33 (1872) ("[t]he punitive damages ought * * * to bear proportion to the actual damages sustained"); *Page v. Yool*, 65 P. 636, 637 (Colo. 1901) (reversing judgment because exemplary damages were "not commensurate with the injury done"); *Flannery v. Baltimore & O.R.R.*, 15 D.C. 111, 125 (1885) ("when we think the [exemplary] verdict rendered is out of all proportion to the injuries received, we feel it our duty to interfere"); *Saunders v. Mullen*, 24 N.W. 529, 529 (Iowa 1885) ("[w]hen the actual damages are so small, the amount allowed as exemplary damages should not be so large"); *Louisville & N.R. v. Roth*, 114 S.W. 264, 266 (Ky. 1908) (punitive damages "must have some reasonable relation to the injury and the cause of it, and not be disproportionate to the one or the other"); *Grant v. McDonogh*, 7 La. Ann. 447, 448 (1852) ("the exemplary damages allowed should bear some proportion to the real damage sustained"); *Mitchell v. Randal*, 137 A. 171, 172 (Pa. 1927) ("[it] is the rule in Pennsylvania that an award of exemplary damages must bear a reasonable proportion to the award of actual damages"); *International & G.N.R. v. Telephone Tel. Co.*, 5 S.W. 517, 519 (Tex. 1887) ("[t]he verdict is clearly excessive, and manifests, by the disproportion between the actual injury sustained and the aggregate sum awarded, that the jury were influenced by passion, prejudice, or partiality"); *Pennington v. Gillaspie*, 66 S.E. 1009, 1015 (W. Va. 1910) (exemplary damages "should bear some reasonable proportion to the actual damages done else they would be unreasonable and excessive"). See generally 4 T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 1344, at 2699 (9th ed. 1920) ("if the amount [of exemplary damages] is out of all proper proportion to the actual damages the verdict will be set aside as excessive"); 13 CYC.

present-day federal statutes, to which this Court has also looked in describing the ratio guidepost (see *id.* at 581 n.33), provide for multiple damages that produce ratios of 1:1 and 2:1.[4]

The ratios that this Court has approved in its cases have been in line with those historical and statutory benchmarks.[5] In *Haslip*, this Court described a ratio of approximately 4:1 as being "close to the line * * * of constitutional impropriety." 499 U.S. at 23-24. Similarly, this Court took care to explain in *BMW* that the relevant ratio of punitive damages to actual and potential harm in *TXO* was "not more than 10 to 1" (517 U.S.

OF L. & P. 119 (1904) ("the [exemplary] damages awarded should bear some reasonable proportion to the real damage sustained").

[4] See, *e.g.*, 15 U.S.C. § 15 (treble damages (*i.e.*, a 2:1 ratio) for antitrust violations); 15 U.S.C. § 1117(b) (treble damages for trademark infringement); 18 U.S.C. § 1964 (treble damages for RICO violations); 31 U.S.C. § 3729 (treble damages for violating False Claims Act); 35 U.S.C. § 284 (up to treble damages for patent infringement).

[5] As this Court has made clear, the proper comparison is to the ***plaintiff's*** actual or potential harms, not to those of non-parties. See, *e.g., Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001) (characterizing second *BMW* guidepost as "the relationship between the penalty and the harm ***to the victim*** caused by the defendant's actions") (emphasis added); *id.* at 440 (characterizing the second guidepost as "the disparity between the harm (or potential harm) suffered ***by the plaintiff*** and the punitive damages award") (emphasis added); *BMW*, 517 U.S. at 575 (looking to "the disparity between the harm or potential harm suffered ***by Dr. Gore*** and his punitive damages award" in describing reasonable-relationship requirement) (emphasis added); *id.* at 581 (noting that in *TXO* "we relied on the difference between [the punitive] figure and the harm ***to the victim*** that would have ensued if the tortious plan had succeeded") (emphasis added).

at 581), and it appeared in fact likely to be considerably lower.[6] The presumptive ratios under traditional measures and the decisions of this Court — for conduct spanning the spectrum, from fraud (*Haslip*) to bid rigging (the Clayton Act) to cheating the government (the False Claims Act) — are thus in the single digits.

This Court in *BMW* identified only a few circumstances as grounds for departure from low multiples. These are: (1) in certain cases involving "low awards of compensatory damages," such as when, "for example, a particularly egregious act has resulted in only a small amount of economic damages";[7] (2) when "the injury is hard to detect"; and (3) when "the monetary value of noneconomic harm might have been difficult to determine," prompting concern that the plaintiff might not be made whole. 517 U.S. at 582.

---

[6] In *TXO*, the respondent contended that the potential harm was between $5 million and $8.3 million, yielding a ratio of between 1.2:1 and 2:1. See 509 U.S. at 461. Although the plurality appeared persuaded that the respondent's estimation of potential harm was exaggerated, it concluded that "the jury could well have believed that TXO was seeking a multimillion dollar reduction in its potential royalty obligation" (*ibid.*), suggesting a ratio of not more than 5:1.

[7] It long has been recognized, and we take no exception to the principle, that when the actual damages are very small, a higher multiple is constitutionally permissible. See, *e.g., St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919) (upholding statutory civil penalty of $75 in case involving a 66-cent overcharge). Needless to say, that limited exception has no application here. Indeed, because the size of the compensatory damages far exceeds any gain State Farm could possibly have hoped would flow from its refusal to settle ($50,000, less the cost of defending at trial), precisely the opposite is true here: any significant amount of punitive damages appears gratuitous and unnecessary to accomplish the state interest in adequate deterrence.

As in *BMW*, this case presents none of the circumstances that might justify a ratio beyond the normal range. *First*, although respondents' economic injury was small, their overall compensatory award was itself strikingly large — exceeding State Farm's maximum possible gain from its conduct by a factor of at least ***20***. *Second*, their injury was not hard to detect: as soon as the jury rendered the excess verdict, the Campbells recognized that they had been injured and immediately sought legal counsel. *Third*, in view of the substantial amount of compensatory damages awarded (and the trial court's conclusion that the original verdict was excessive in relation to the injury), there can be no concern here that the compensatory damages were inadequate to make the Campbells whole for the distress they allegedly suffered as a result of the excess verdict. As numerous federal courts have recognized in the wake of *BMW*, under such circumstances, the imposition of punitive damages that are many times larger than the compensatory damages cannot be justified.[8]

---

[8] As far as we can discern, in the more than six years since *BMW*, the largest ratio of punitive damages to actual or potential harm to survive appellate review by the federal courts in a case involving harm of $500,000 or more is 6:1. See *Continental Trend Res., Inc. v. OXY USA Inc.*, 101 F.3d 634 (10th Cir. 1996) (ordering remittitur of $30 million punitive award to $6 million where potential harm was $1 million). The federal courts routinely have reduced punitive awards to modest multiples of compensatory damages when the compensatory award (or the potential harm) has been at least $500,000. See *Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446 (3d Cir. 1999) (punitive verdict of $100 million reduced by trial court to $50 million and court of appeals to $1 million where compensatory damages were $48 million); *2660 Woodley Rd. Joint Venture v. ITT Sheraton Corp.*, 2002 WL 53913 (D. Del. Jan. 10, 2002) (reducing $37.5 million punitive award to $17,415,000 where compensatory damages were $11,610,000); *Komlosi v. Fudenberg*, 2000 WL 351414 (S.D.N.Y. Mar. 31, 2000) (ordering remittitur of $10 million punitive award to $500,000 where compensatory damages were $1.9 million); *Trovan, Ltd. v. Pfizer, Inc.*, 2000 WL 709149 (C.D. Cal. May 24, 2000) (ordering conditional remittitur of $135 million punitive award to $1.5 million where compensatory damages were $500,000); *MMAR Group, Inc. v. Dow Jones & Co.*, 987 F. Supp. 535 (S.D. Tex. 1997) (ordering remittitur of $200 million punitive award to $45 million where compensatory damages were $22.7 million). See also *In re Exxon Valdez*, 270 F.3d 1215, 1243 (9th Cir. 2001) (finding excessive a $5 billion punitive award that was between 12 and 17 times the harm from the conduct, and remanding for district court to set a lower amount of punitive damages).

B. The Fact That The Conduct That Injured The Plaintiff May Be Part Of A Broader Pattern Of Misconduct Is Not A Valid Justification For Disregarding The Reasonable Relationship Requirement.

In choosing to disregard the 145:1 ratio in this case, the Utah Supreme Court relied heavily on the supposedly widespread nature of State Farm's wrongdoing.[9] The court's

---

[9] The court identified three other rationales for allowing an award that produced a 145:1 ratio. First, it observed that there was evidence that State Farm had not altered its practices after incurring a $100 million punitive verdict in a first-party bad faith case in Texas. Second, it observed that State Farm is "an enormous company with massive wealth." Third, it invoked testimony that only one out of every 50,000 insureds who are dissatisfied with the way State Farm has handled their claim persevere long enough to take their dispute to trial. Pet. App. 30a, 31a, 34a. The second point is the focus of the amicus brief of the Business Roundtable and also is addressed in the amicus brief of the American Tort Reform Association. The third point is addressed in detail in the amicus brief of A. Mitchell Polinsky, Steven Shavell, and Citizens for a Sound Economy Foundation. The first point is addressed in State Farm's brief. We add, however, that because jurors lack the institutional competence to engage in far-flung regulation of the business of insurance, as

decision is dominated by discussion of conduct directed at, and harms supposedly suffered by, people other than the Campbells. For example, expressly looking to "the effect of the defendant's conduct on others" (Pet. App. 22a), the court stated: "[t]he larger the number of people affected, the greater the justification for higher punitive damages" (*ibid.*). The court emphasized "the harmful effect on the larger community of all those who deal with the company" (*id.* at 21a), and "the misconduct carried out toward Utah consumers during the past two decades" (*id.* at 24a). Finally, the court declared that, ***"[e]ven if the harm to the Campbells can be appropriately characterized as minimal, the trial court's assessment of the situation is on target: 'The harm is minor to the individual but massive in the aggregate.'"*** *Id.* at 22a (emphasis added).

There are multiple reasons, however, why punishing a defendant in an individual case for conduct directed at, and harms suffered by, non-parties — which is precisely what the Utah Supreme Court did by using evidence of such conduct as a rationale for jettisoning the reasonable relationship requirement — is fundamentally unfair and hence is inconsistent with due process.

---

spelled out in detail in the *amicus* brief of the American Council of Life Insurers ("ACLI"), an extraordinary verdict such as that in the Texas case can reasonably be viewed as aberrational — a suspicion corroborated by (i) the absence of any evidence that the Texas regulators found State Farm's handling of the first-party claim in that case to necessitate a change in policy; (ii) State Farm's industry-leading complaint ratios and favorable consumer survey ratings (see ACLI Am. Br. at 11-12); and (iii) the fact that the case settled for "pennies on the dollar" (12 Tr. 62, 64, 111; 17 Tr. 261), suggesting that even the plaintiff saw little prospect of the verdict surviving appeal. State Farm cannot justifiably be faulted for failing to change its practices in response to a single, apparently unreliable verdict.

1. The Utah Supreme Court's approach unfairly subjects defendants to all the risks of a class action, while affording them none of the safeguards.

In brushing aside the 145:1 ratio on the ground that State Farm had engaged in a twenty-year course of misconduct, the Utah Supreme Court essentially allowed the Campbells to turn an individual case into a class action without affording State Farm any of the protections associated with such a procedure.[10] For example, "typicality" is a core threshold requirement for class certification, yet no one seriously could suggest that the isolated act of third-party bad faith at issue in this case is the least bit typical of the myriad first-party claims handling practices that were excoriated by respondents' witnesses. Similarly, it should be beyond serious dispute that there is insufficient similarity among the different kinds of conduct for which State Farm was punished to satisfy the requirements that common issues predominate and that a single court and jury be able to adjudicate manageably the propriety of such conduct. Indeed, counsel for respondents affirmatively stated during the argument in the Utah Supreme Court that it was necessary to allow this jury to punish State Farm for all of the conduct directed at others ***because*** the commonality requirement would prevent the other alleged victims ever from being aggregated in a class action. See 5/24/00 Argument Tr. 28-29 (Mr. Tribe: "The class actions that you might have to envision to achieve the deterrent purpose if regulators are cozy with the regulated and if punitive damages are arbitrarily [c]apped are a nightmare. After *Ortiz* and the state analogs of those, how you

---

[10] We do not mean to suggest that it would be proper to shoehorn into a class action the disparate allegations that respondents relied upon in this case. Indeed, even a class action limited to particular first-party claims practices might involve too many individualized issues to be fairly litigated as a class action. See note 12, *infra*.

could get adequate commonalities to make those work is beyond me.").[11]

These prerequisites to valid class actions are important because they reflect the practical impossibility of defending in a single case against disparate allegations of misconduct. See, *e.g., Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998) (recognizing procedural unfairness of having to defend against "fictional composite" plaintiff whose claims might be "much stronger than any plaintiff's individual action would be" in class action in which plaintiffs are allowed to "strike [defendant] with selective allegations, which may or may not have been available to individual named plaintiffs"). The provision of an adequate opportunity to defend is, of course, an essential component of due process. See, *e.g.*, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982); *Lindsey v. Normet*, 405 U.S. 56, 66 (1972); *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971).

Another critical safeguard, especially relevant to the excessiveness inquiry and absent from this type of pseudo-class action, is the right to bind the class members. In a class action, the members of the class who do not opt out are bound by the outcome of the case — win or lose — and no additional punitive damages are recoverable by any member of the class.

[11] It is, we respectfully submit, bizarre and more than a little anarchic to suggest that the regulation of insurance or other businesses should be taken out of the hands of expert regulators, based on lawyers' allegations of "coziness" with those they regulate, and turned over to a single jury operating in the rhetorically charged isolation booth of a punitive damages trial. Yet juries are urged repeatedly, in trial after trial across the country, to assume the role of industry-wide policemen — which is plaintiffs' way of dealing with the situation in which, as here, their accusations have met with little acceptance among regulators (and of attempting to inflame juries in order to ratchet up the punitive damages).

Here, respondents endeavor to collect for themselves the punishment that they believe all policyholders, if victorious, would collect, while at the same time leaving other potential plaintiffs free to try to hit the jackpot themselves. As we discuss in greater detail below, it is fundamentally unfair to place defendants in such a position.

2. The Utah Supreme Court's approach engenders a grave risk of excessive, multiple punishment.

a. Because non-parties are not bound by its judgment, the Utah Supreme Court's approach engenders a grave risk of excessive, multiple punishment for the same conduct causing the exact same harms. That risk is not merely hypothetical. In this case, for example, one of the many first-party claims practices alleged to be wrongful by respondents' experts was State Farm's use of the lower cost of parts made by companies other than the original equipment manufacturer ("non-OEM parts") in calculating the amount it would pay to settle claims for damage to insureds' vehicles. In 1999, an Illinois court hearing a 48-state class action for that same, nationwide practice imposed punitive damages of $600 million against State Farm. See *Avery v. State Farm Mut. Auto. Ins. Co.*, 746 N.E.2d 1242 (Ill. App. Ct. 2001).[12] That case starkly illustrates the danger, and manifest unfairness, of allowing juries to punish the defendant for conduct that did not affect the plaintiff

[12] State Farm has appealed the judgment to the Illinois Supreme Court on multiple grounds, including the impropriety of applying Illinois law to transactions that occurred entirely in other states and the unfairness of lumping millions of individualized claims together in a single case. Notably, State Farm has been supported in the Illinois courts by a wide range of amici, including this amicus, the National Association of Insurance Commissioners, numerous individual state insurance commissioners (including both Utah's and Illinois'), and several consumer groups.

in the case before them: as things now stand, State Farm has been punished in ***both*** lawsuits for its use, in Utah as well as elsewhere, of non-OEM parts.

It is fundamentally unfair to allow a plaintiff in an individual case to collect punitive damages for conduct of the defendant directed at other parties, while subsequent juries remain free to impose punishment for the very same conduct. As this Court explained in the context of an *in rem* action in which the Commonwealth of Pennsylvania claimed entitlement to certain funds under its escheat statute, a property owner "is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again in another jurisdiction or in a suit brought by a claimant who is not bound by the first judgment." *Western Union Co. v. Pennsylvania,* 368 U.S. 71, 75 (1961).[13] See also *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 168-169 (1873) (describing as "the maxim" in civil cases "that no man shall be twice vexed for one and the same cause"). That is precisely the situation when a jury in an individual case imposes punitive damages that are disproportionate to the injury to the plaintiff on the theory that the defendant committed other bad acts against individuals who are not before the court. See *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839-840 (2d Cir. 1967)

---

[13] In *Western Union,* the Court concluded that "there can be no doubt that Western Union has been denied due process by the Pennsylvania judgment here unless the Pennsylvania courts had power to protect Western Union from any other claim, including the claim of the State of New York * * *. But New York was not a party to this proceeding and could not have been made a party, and, of course, New York's claims could not be cut off where New York was not heard as a party." *Ibid.* The situation in which Western Union found itself is not unlike State Farm's except that, under the Utah Supreme Court's approach, State Farm can take no comfort that efforts to punish it for the same conduct will be limited to just two plaintiffs.

(Friendly, J.) (describing multiple-punishment problem); *Juzwin v. Amtorg Trading Corp.*, 718 F. Supp. 1233, 1235-1236 (D.N.J. 1989) (observing that multiple awards of punitive damages violate the defendant's due process rights).

While the legal prohibition against multiple punishment has a long pedigree, until recently the issue was largely academic, due to the nature of tort litigation in the first 175 years of the Republic. In *Roginsky* — one of the first decisions to highlight the "destructive synergism between traditional punitive damages doctrine and modern mass tort litigation" (Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 141 (1986)) — Judge Friendly noted that punitive damages had their genesis in intentional torts, in which "usually there is but a single victim; a punitive recovery by him ends the matter, except for such additional liability as may be provided by the criminal law." *Roginsky,* 378 F.2d at 838. That changed, however, with the advent of mass tort litigation. See Jeffries, *supra*, 72 Va. L. Rev. at 141-143. Now "punitive damages may be repetitively invoked against a single course of conduct in unfair and potentially ruinous aggregation." *Id.* at 139. In that context, Judge Friendly cautioned: "We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be administered as to avoid overkill." *Roginsky,* 378 F.2d at 839.

The Utah Supreme Court's approach engenders precisely this risk. As the Texas Supreme Court has recognized, "if a single punitive damages award becomes unconstitutional when it can fairly be characterized as 'grossly excessive' in relation to a state's legitimate interests in punishment and deterrence, it follows that the aggregate amount of multiple awards may also surpass a constitutional threshold." *Owens-Corning Fiberglas Corp. v. Malone,* 972 S.W.2d 35, 51 (Tex. 1998).

b. It is no answer to say that the threat of excessive, multiple punishment can be dealt with in the later cases, by means of jury instructions or "credits" for prior punitive awards. The defendant may prevail in some or all of those future actions. In that event, there will be no occasion for the defendant to receive "credit" for the earlier punitive award; nor can there be any justification whatever for allowing a single jury to punish for harm to others for which other juries have exonerated the defendant. For example, the jury in Utah was told about a case against a State Farm company in Texas alleging bad faith denial of a claim for damage to the foundation of the home. 25 Tr. 129-130. On appeal, the Texas Supreme Court unanimously granted State Farm judgment as a matter of law on punitive damages, concluding that there was no evidence that State Farm acted with malice or unconscionably. *State Farm Lloyds v. Nicolau,* 951 S.W.2d 444, 450-451 (Tex. 1997).[14] Yet as far as the jury in the instant case was concerned, *Nicolau* was an illustration of egregious misconduct that contributed to the overall impression that a massive punishment was warranted. But if the court directly confronted with that conduct (*i.e.,* the *Nicolau* court) has determined that it does not warrant punitive damages, how can it be justifiable for another court (*i.e.,* the *Campbell* court) to allow punishment for that very conduct? Such a result cannot be squared with due process.[15]

---

[14] By a 5-4 vote, the court did uphold the finding of bad faith under Texas's extraordinarily lenient sufficiency standard, though observing that, "[w]ere we the trier of fact in this case, we may well have concluded that State Farm did not act in bad faith." *Id.* at 450.

[15] This is not purely a problem of extraterritorial punishment. The same constitutional concern would arise if other Utah juries had exonerated State Farm in other cases, and this jury was nevertheless allowed to punish on the basis of harms suffered by the plaintiffs in those cases.

Moreover, the court that upholds the first large verdict generally has no way of ensuring that other courts, often in other states, will adequately protect the defendant from excessive punishment deriving from multiple unapportioned judgments.[16] Indeed, the "pay now get credit (maybe) later" approach turns a blind eye to the practical reality that courts in one state will often be unwilling to limit the recovery to an in-state plaintiff because a plaintiff in a prior case in another state received a punitive verdict that was based on the overall course of conduct and that already punished for the harms to the plaintiffs before them. As Judge Friendly put it, "whatever the right result may be in strict theory, we think it somewhat unrealistic to expect a judge, say in New Mexico, to tell a jury that their fellow townsman should get very little by way of punitive damages because Toole in California and Roginsky and Mrs. Ostopowitz in New York had stripped that cupboard bare * * *." *Roginsky,* 378 F.2d at 840. See also *Juzwin,* 718 F. Supp. at 1235-1236; *Fischer v. Johns-Manville Corp.,* 512 A.2d 466, 478 (N.J. 1986). Indeed, if the remarkably hostile tenor of the Utah court's opinion is any indicator, courts in other states presented with the same barrage of allegations leveled in this case can be expected to insist on taking their own vengeance against State Farm with, as in this case, only a percentage of State Farm's surplus as the limit on the acceptable amount of punishment.

In any event, requiring the defendant to invoke prior punitive judgments as a basis for lenity in later trials is unfair. To begin with, many states do not allow courts reviewing awards for excessiveness to consider evidence that was not introduced at trial. See, *e.g., Stevens v. Owens-Corning*

---

[16] "Neither does it seem either fair or practicable to limit punitive recoveries to an indeterminate number of first-comers, leaving it to some unascertained court to cry, 'Hold, enough,' in the hope that others would follow." *Roginsky,* 378 F.2d at 839-840.

Fiberglas Corp., 49 Cal. App. 4th 1645, 1661-1662 (1996); *Kochan v. Owens-Corning Fiberglas Corp.*, 610 N.E.2d 683, 697 (Ill. App. Ct. 1993); *Davis v. Celotex Corp.*, 420 S.E.2d 557, 564-566 (W. Va. 1992). At the same time, most courts treat requests for bifurcation as being within the virtually unfettered discretion of the trial court. When a trial court denies bifurcation, the defendant that wishes to get "credit" for prior punitive judgments is placed in the untenable position of having to inform the jury about those judgments before it even has been found liable. And even if bifurcation is granted, it is wholly unpredictable what use juries might make of such evidence; they could, for example, use it as a benchmark for their own award — or, worse, as in this case, a justification for imposing a still higher one.

Exacerbating the unfairness still further, many courts have refused to give "credit" for prior ***settlements*** even while acknowledging that such settlements may have been inflated to take into account the risk of high punitive damages. See, *e.g., Dunn v. HOVIC*, 1 F.3d 1371,1389-1390 (3d Cir. 1993) (en banc); *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 282 (2d Cir. 1990). And other courts have indicated that no credit should be given to awards that remain pending on appeal (see, *e.g., Malone*, 972 S.W.2d at 43-44, 52, 53, 54), which, because of the length of the appellate process, creates a serious prospect that, in the end, the defendant will be overpunished.

Finally, the "credit" approach is inherently unworkable. How are subsequent courts and juries to know whether prior juries intended their punishment to be for the full course of the defendant's conduct, part of that conduct, or only the conduct with respect to the particular plaintiff? This is particularly the case because, typically, plaintiffs' counsel will simply invoke the full course of the defendant's conduct, while suggesting a punishment that is a percentage of the defendant's net worth,

profits, or revenues. Distilling the punishing jury's intentions under such circumstances is impossible.

c. There is a precise parallel to this problem in this Court's constitutional jurisprudence regarding the allowable limits of state taxation. In order to prevent duplicative taxation of the same income by different states, the Court requires that each state apportion its tax to the share of income fairly attributable to the taxpayer's business in the state. See, *e.g., Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 777-778 (1992). That requirement is of constitutional dimension. *Id.* at 778. So with punitive damages, the Court should not permit a jury to impose on the defendant more than an apportioned share of the total punishment that can legitimately be imposed for the full range of impacts of the conduct being punished. The principal mechanism that assures such apportionment — and guarantees that each jury operates within its own legitimate domain — is the requirement of a reasonable relationship between the punitive damages and the injuries suffered by the plaintiff(s) in the case being adjudicated.

3. The Utah Supreme Court's approach is a one-way ratchet that fails to account for the possibility that other juries and courts might not find the defendant's conduct to be punishable.

The approach adopted by the Utah Supreme Court also fails to account for the fact that other juries (or courts and regulators) considering precisely the same conduct might conclude that the defendant did nothing wrong at all or, at least, that the conduct did not warrant punishment. Again, State Farm's use of non-OEM parts supplies a good example. Given the fact that literally dozens of states expressly authorize insurers to make use of non-OEM parts, it hardly is a stretch of the imagination to suppose that many juries would find State Farm's use of such parts not to be wrongful at all, much less

punishable. Indeed, at least one state appellate court has held, ***as a matter of law***, that it is not categorically wrongful for State Farm to use the cost of non-OEM parts in settling claims. See *Berry v. State Farm Mut. Auto. Ins. Co.*, 9 S.W.3d 884 (Tex. Ct. App. 2000). More broadly, other courts and juries have exonerated State Farm of allegations of wrongdoing in first-party cases — notwithstanding the testimony of the same experts who succeeded in convincing the Utah jury that State Farm is the corporate equivalent of the evil empire. See, *e.g.*, *State Farm Fire & Cas. Co. v. Owen*, 729 So. 2d 834 (Ala. 1998) (holding that State Farm had no duty to disclose at point of sale that its cost of replacing jewelry would be less than appraisal in case in which Prater testified); *Holderness v. State Farm Ins.*, 2001 WL 1740090 (Alaska Super. Ct. Sept. 10, 2001) (verdict for State Farm in first-party case in which Fye testified); *Dickson v. State Farm Ins. Co.*, 2000 WL 547395 (Alaska Super Ct. Feb. 14, 2000) (same); *Schrader v. State Farm Mut. Auto. Ins. Co.*, No. CV 91-23590 (Ariz. Super. Ct. June 20, 1997) (same). See also *Walter v. State Farm Fire & Cas. Co.*, 1999 WL 1069154 (C.D. Cal. Feb. 18, 1999) (plaintiff awarded $3,000 in first-party home damage case in which Prater testified).

Because the judgment in an individual case is not binding on anyone other than the plaintiff, the "punish-for-everything" approach guarantees that sooner or later every corporate defendant will be held liable for one and, more likely, multiple "percentage-of-net-worth" punishments, no matter how many times it succeeds in fending off that cataclysmic outcome before and after it finally happens. That is the height of unfairness.

4. It is grossly unfair to expect a defendant in an individual case to fend off far-flung allegations of conduct directed at individuals who are not before the court.

The unfairness of the one-way ratchet approach endorsed by the Utah Supreme Court is magnified by the burden to which it subjects a defendant in an individual tort case to defend against not just the underlying cause of action but also a smorgasbord of other allegations of misconduct leveled in the most general way by its opponent's expert witnesses — charges far more easily made than refuted. Most civil trials are conducted under strict time limitations, and for good reason: most civil juries don't have the time or patience to sit through a six-month or year-long trial. Yet that is what would be required for a defendant to have a reasonable chance of rebutting the enormous array of allegations of misconduct that were casually thrown about in this case.[17] For example, respondents' witnesses criticized State Farm's use of appearance allowances in settling claims for minor cosmetic damage to insureds' vehicles; its adjustment for depreciation and/or betterment in valuing losses; its use of market surveys (rather than a guide book) to settle total loss claims; its specification of non-OEM parts in repair estimates; its alleged underpayment of claims for hail damage in Colorado; its allegedly improper use of biased doctors to perform independent medical examinations on insureds who were making claims for medical payments; its allegedly improper use of a computer program in settling claims for damage to vehicles; the underpayment of earthquake claims by an entirely different State Farm company in California; and the prospective

---

[17] As explained in the ACLI amicus brief (at 9), the typical market conduct examination performed by expert insurance regulators takes at least seven months.

cancellation of hurricane insurance by that separate company in Florida — and this list isn't even comprehensive. See Pet. Br. 8-10 and record citations therein.

Even if the Utah trial court had been willing to give State Farm unlimited time to respond to this vast array of charges — an assumption that the record does not support (see 1 Tr. 103, informing jury that trial would last one to two months) — it would have been folly for State Farm to have attempted to do so.[18] It is simple common sense that, by responding to allegations of this sort, defendants risk dignifying them in the eyes of the jury. The choice between defending against every accusation thrown at it, which risks suggesting to the jury that the defendant has something to be concerned about, and making what amounts to a general denial, which risks causing the jury to conclude that the defendant has no good defense of its practices, tilts the litigation playing field dramatically and unjustifiably in favor of the plaintiff and is for that reason fundamentally unfair.[19]

---

[18] During a pre-trial hearing, the trial court indicated that "[t]he fundamental premise of the schedule is that each side gets the same amount of time." 5/17/96 Tr. 5. Hence, State Farm was capped at the amount of time taken by respondents, even though it is a matter of common sense that it takes longer to respond to a hodgepodge of loose allegations than to make them.

[19] Consider this very case. A trial confined to the handling of third-party claims would have looked dramatically different from the circus that actually unfolded, and likely would have produced a defense verdict in light of the evidence showing what a tiny proportion of third-party claims resulted in excess verdicts, that none of the insureds ever had to pay judgments out of their own funds, and that there is no plausible motive to be ascribed to State Farm for deliberately refusing to settle cases that it subjectively believes are likely to result in excess verdicts. In any event, it is impossible to tell what a jury focusing on the allegations relating to the handling of the claim against Campbell would have decided.

5. Civil juries lack the institutional competence to perform the role of super-regulator.

There also is an issue of comparative institutional competence. The Utah Supreme Court essentially elevated the jury to the position of an all-powerful, presumptively infallible national regulator, passing judgment on, and doling out nationwide punishment for, a wide range of alleged misconduct by State Farm. Yet while our legal system long has recognized a lay jury's competence to decide specific factual issues relating to the claims between the parties before it, there must be serious questions about allowing the jury to expand its role to that of super-regulator. To begin with, a jury simply lacks the expertise and resources of an expert regulatory agency. Thus, while our system may be willing to rely on a lay jury's collective common sense to decide a limited number of factual issues closely tethered to the plaintiff's cause of action, the risk of error is too grave to permit that jury to range far and wide, scrutinizing all manner of practices without any background in the relevant areas. Just as due process requires an unbiased decision-maker, so too must it require that the decision-maker possess some minimal level of competence to perform its task.

In addition, even the most qualified and diligent of juries is limited by the information that is presented to it. In a case like this one, that information comes to it largely through the partisan lens of paid expert witnesses. Often much of the information on which the expert relies for his or her opinions is not even introduced into evidence. This case well illustrates the point. One of respondents' experts, Stephen Prater, brought with him to court dozens of boxes, containing 73,278 documents from this and other cases on which he had worked in the past, from which he purported to base his opinions that State Farm was engaged in a grand scheme to cheat its

policyholders. See 17 Tr. 22, 34, 36. He also informed the jury that his opinion was based on depositions from other cases — "[h]undreds of other people from different parts of the country, coast to coast, talking about various cases pending or resolved in other jurisdictions" (17 Tr. 35). Virtually none of this information was actually introduced into evidence. See 17 Tr. 22 ("Q: * * * Are you going to read all these boxes? A: I have read them, but I'm not going to read them here.").

Not only are jurors in an individual tort case not given all the facts they need to conduct the equivalent of a market conduct examination, they are not supplied with the relevant law either. For example, here the jurors were instructed only on Utah law pertaining to the causes of action at issue and punitive damages. They were not instructed on the laws of any other state, and they were not even instructed on the Utah statutes and regulations governing the myriad first-party practices that had been attacked during the trial.

By contrast, insurance regulators in the fifty states and the District of Columbia do have the time, expertise, and knowledge of the governing laws to evaluate the range of an insurer's practices — taking into account state policies as reflected in statutes and regulations; actuarial information; knowledge of insurance markets; interviews with relevant policyholders and company employees and executives; and whatever documents the regulators deem pertinent. Moreover, the information such regulators would scrutinize is not filtered through the distorted lens of a paid expert and the heated rhetoric of skilled counsel. Instead, the regulators start with the "raw data" and draw their own conclusions from it.[20]

---

[20] ACLI provides an illuminating explanation of market conduct examinations in its amicus brief (at 7-10).

By their very nature, civil juries lack the institutional competence to take on the new role that the courts below created for them. The role of regulating a company's overall business practices should be left with expert regulators, and juries should be confined to their traditional domain: evaluating the facts and circumstances of the particular case before them. As Justice Breyer has aptly put it, it is "anomalous" to "grant greater power * * * to a single state jury than to state officials acting through state administrative or legislative lawmaking processes." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 504 (1996) (Breyer, J., concurring).

6. The Utah Supreme Court's approach threatens to turn every case into a "bet-the-company" event, thereby distorting the legal system by creating inordinate pressure to settle even weak cases.

Finally, allowing what may be an aberrational jury verdict to punish a defendant for alleged misconduct against masses of people not before the court would expose almost any large corporation to at least one and possibly several immense punitive exactions. That would be so even if the majority of juries — as well as regulators — would conclude that the defendant did not act reprehensibly or that its conduct was not tortious at all.[21]

State Farm, for example, handles approximately 14 million claims by or against its policyholders every year. 20 Tr. 198-199; 21 Tr. 184; 28 Tr. 171-172. It is not difficult to imagine

---

[21] If $145 million is an appropriate award in this case involving an isolated incident of third-party bad faith, imagine the punishments State Farm could suffer in cases in which the practices that were used to brand it an evil-doer here actually are at issue. Even if only a small percentage of individuals who sue prevail, the aggregate punishment would soon cripple the company — to the enormous detriment of its millions of satisfied policyholders.

that lawyers fishing in this extraordinarily well stocked pond will be able to come up with at least a handful of cases in which claims were or appear to have been mishandled. Building on that predicate, if the procedure followed below is legitimate, they can try the entire company's practices over and over again and, as is inevitable in a system such as ours, occasionally find a jury that credits their allegations. Unless such juries are confined in their sanctioning power to their legitimate domain — the specific case before them, such a litigation regime gives rise to grossly unfair and potentially calamitous consequences. It is the second (and third) *BMW* guideposts that perform the confining function. When they are jettisoned, as in this case, the resulting proceeding is grossly unfair to the defendant.[22]

Moreover, by converting almost any case against a large institutional defendant into a "bet-the-company" proceeding, exposure in individual cases to company-wide, nationwide sanctions at the hands of a single, unpredictable jury severely distorts the legal process Because of the risk of an enormous punitive judgment predicated largely on allegations of misconduct having nothing to do with the plaintiff before the court, plaintiffs and their attorneys can force substantial settlements from corporate defendants — regardless of the existence or gravity of any actual wrongdoing. See, *e.g.*, *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (observing that aggregating the claims of multiple alleged victims in a single case can place a defendant that has won the lion's share of individual cases "under intense pressure to settle" rather than "roll these dice" and risk potentially bankrupting liability); *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("[a]ggregation of claims * * *

[22] For a good discussion of the problems with the Utah Supreme Court's application of the third *BMW* guidepost, see Brief of the American Tort Reform Association as *Amicus Curiae* in Support of Petitioner § C.

makes it more likely that a defendant will be found liable and results in significantly higher damage awards," which in turn "creates insurmountable pressure on defendants to settle" because the prospect of "an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low").

Such pressures have broad and harmful ramifications. "As the modern lawsuit grows more complex and as large classes of plaintiff-victims bring suits against companies and even industries, the threat of punitive damages looms larger over defendants." *Developments, The Paths of Civil Litigation,* 113 HARV. L. REV. 1783, 1783 (2000). The sheer unpredictability of the current system results in overdeterrence, causing firms to discontinue products and to decide against introducing new products, regardless of their safety or value. Polinsky & Shavell, *Punitive Damages: An Economic Analysis,* 111 HARV. L. REV. 869, 878-881 (1998); Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts,* 87 GEO. L.J. 285, 322-327 (1998). And few possibilities could increase the *in terrorem* effect of punitive damages more than the prospect of facing multiple, repetitive trials in which judges and jurors seek to punish for a sprawling set of harms, unconstrained by any requirement that a punitive award be reasonably related to the harm to the plaintiff.

C. When, As Here, Evidence Of Conduct Directed At Non-Parties Has Been Admitted, It Is Especially Important To Enforce The Requirement That Punitive Damages Be Reasonably Related To The Plaintiff's Injury.

There is only one fair and workable way to administer punitive damages when it is claimed that the conduct that injured the plaintiff is part of a broader pattern of misconduct that has injured multiple individuals who are not before the court. That is to require that the punitive damages in any

particular case be limited to punishing for what the defendant did to the plaintiff or plaintiffs in ***that*** case. As the Mississippi Supreme Court recently put it in a case not dissimilar to this one, "[t]he constitutional question presented is whether MIC Life had fair notice that it could be punished $1 million for failing to pay a refund of $637.99 to Mrs. Hicks, not some 'potential,' hypothetical aggregate of harm to persons not before this Court and against whom no harm has been proven." *MIC Life Ins. Co. v. Hicks,* 2002 WL 1722168, at *6 (Miss. July 25, 2002).

Such an approach, if faithfully followed, eliminates concerns about excessive, multiple punishments: because each punishment is apportioned to the harm done to the particular plaintiff, the aggregate punishment will not involve any double or triple counting. Moreover, because the punishment in any case is imposed solely for what the defendant did to the plaintiff(s) in that case, a defendant that wins a substantial percentage of its cases will not suffer the unfairness of having its victories eviscerated in a single case awarding punitive damages for the entire course of its conduct.

This requirement does not prevent the jury from considering similar conduct towards others. The jury may consider the conduct insofar as it is relevant to its inquiry. Thus, in discussing the ***reprehensibility*** guidepost, this Court has explained that

> evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law. Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance.

BMW, 517 U.S. at 576-577 (citation omitted).

But as this Court has "repeatedly emphasized," even under recidivist sentencing schemes "the enhanced punishment imposed for the [present] offense 'is not to be viewed as * * * [an] additional penalty for the earlier crimes,' but instead as 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.'" *Witte v. United States,* 515 U.S. 389, 400 (1995) (quoting *Gryger v. Burke,* 334 U.S. 728, 732 (1948)).

Indeed, the Court already laid the groundwork for this approach by holding that, although juries may consider similar conduct that took place in other states when gauging the degree of reprehensibility of the conduct directed at the plaintiff, they may not punish directly for that extraterritorial conduct. *BMW,* 517 U.S. at 574 n.21. That distinction in turn was derived from the criminal law context, about which this Court observed:

> A sentencing judge may even consider past criminal behavior which did not result in a conviction and lawful conduct that bears on the defendant's character and prospects for rehabilitation. But we have never held that a sentencing court could properly *punish* lawful conduct. This distinction is precisely the one we draw here.

Id. at 573 n.19 (emphasis in original; citation omitted).[23]

---

[23] Of course, allowing a jury to consider such far-ranging evidence — and in a context in which there are no statutory limits on its "sentencing" discretion — is a far different matter and raises greatly magnified fairness concerns because of the differences in experience and access to relevant information between judges and jurors.

It follows that under *BMW* and its criminal law antecedents the existence of similar misconduct towards non-parties can move the penalty higher up in the range of punishments that are permissible for the underlying offense, but cannot form the basis for punishment. For example, whereas an isolated tort might merit punitive damages equal to the actual harm (a 1:1 ratio), the same act committed by a recidivist might warrant more severe punishment — 2:1, or perhaps, when the conduct being punished involves "intentional malice" (*BMW*, 517 U.S. at 576 (describing *TXO*)) or is otherwise extraordinarily heinous, even as much as 10:1. The relationship must remain "reasonable" and "proportionate" to the plaintiff(s)' harms, however — a requirement that cannot simply be cast aside on the basis of other factors or circumstances.

* * *

In the Utah Supreme Court's view, the requirement that a punitive damages award be proportional to the harm caused to the plaintiff may be tossed aside if there is evidence that the conduct that caused the plaintiff's injury is part of a broader pattern of misconduct. Requiring a firm link to each plaintiff's harm, however, is the ***only*** means of ensuring that, at the end of the day, the right amount of punishment overall will be administered. It also is the sole means of protecting against the patent inequity of allowing a single plaintiff to extract punishment for the full impact of a defendant's conduct on the basis of what may well be an aberrational verdict. And it is the only approach that is validated by historical practice. Double and triple digit ratios cannot be justified by recourse to the harms suffered by parties that are not before the court.

CONCLUSION

The judgment of the Utah Supreme Court should be reversed.

Respectfully submitted.

EVAN M. TAGER
Mayer, Brown, Rowe & Maw
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

ANDREW L. FREY
Counsel of Record
ANDREW H. SCHAPIRO
Mayer, Brown, Rowe & Maw
1675 Broadway
New York, NY 10019
(212) 506-2500

ROBIN S. CONRAD
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

AUGUST 2002